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The kids are all right

Family status clarified by the federal court of appeal

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FAMILY STATUS has become a hot topic in workplace human rights. The issue is made more interesting given that decision-makers across the country have come to different conclusions on the scope and content of family status accommodation, leading to significant uncertainty. Two recent decisions released by the Federal Court of Appeal — *Johnstone v. Canada (Border Services Agency)* and *Seeley v. Canadian National Railway* — seek to clarify the current state of the law. Both cases involve a complaint by an employee requesting a change in a workplace policy to better meet childcare obligations.

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What is family status?

The first issue the court resolved is the definition of "family status." Whereas protected grounds such as race and religion are easy to understand, parties engaged in a conflict over family status discrimination often disagree on its definition. Does it protect an individual from discrimination based on their status as a parent, or does it include all obligations flowing from parenthood, however arguably trivial? Significantly, the court rejected the broader interpretation and held the protection only extends to obligations giving rise to legal liability for the parent and not to personal preferences. In other words, while childcare is part of family status, the protection is limited to substantial parental obligations, as the court stated:

"The childcare obligations that are contemplated under family status should be

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Parental duties

« *from* **FAMILY STATUS** *on page 1*

those that have immutable or constructively immutable characteristics, such as **those that form an integral component of the legal relationship between a parent and a child.** As a result, the childcare obligations at issue are those which a parent cannot neglect without engaging his or her legal liability. Thus a parent cannot leave a young child without supervision at home in order to pursue his or her work, since this would constitute a form of neglect.

"Voluntary family activities, such as family trips, participation in extracurricular sports events, etc. do not have this immutable characteristic since they result from **parental choices rather than parental obligations**. These activities would not normally trigger a claim to discrimination resulting in some obligation to accommodate by an employer [emphasis added]."

How does an employee prove family status discrimination?

The court also clarified how the concept of discrimination is to be applied in family status cases, acknowledging it is a contextual analysis, and laying out four elements an employee must prove for a case of family status discrimination:

- A child is under the employee's care and supervision
- The childcare obligation engages the employee's legal responsibility for that child, as opposed to a personal choice
- The employee has made reasonable efforts to meet those childcare obligations, and no alternative solution is reasonably accessible
- The impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

Of particular importance for employers is the court's ruling that an employee must try to reconcile work and family obligations before a case of discrimination is made out:

"Normally, parents have various options available to meet their parental obligations. Therefore, it cannot be said that a childcare obligation has resulted in an employee being unable to meet his or her work obligations unless no reasonable childcare alternative is reasonably available to the employee. **It is only if the employee has sought out reasonable alternative childcare arrangements unsuccessfully, and remains unable to fulfill his or her parental obligations, that a prima facie case of discrimination will be made out** [emphasis added]."

The court was also clear to point out that this requirement does not create a hierarchy of rights or a greater burden on complainants in family status cases, but rather recognizes the context where such cases take place.

Lessons for employers

It is important to take all human rights concerns seriously. When an employee raises a family status issue, treat it with the same attention as a request for medical accommodation. However, in determining whether there is an obligation to accommodate, remember an employer does not have a freestanding duty to accommodate all family-related requests. Before a discussion of accommodation begins, an employer is entitled to ensure the claim deals with a substantial parental obligation (not a preference), and the employee has provided evidence of her individual efforts to reconcile work and family obligations outside of the workplace.

For more information see:

- *Johnstone v. Canada (Border Services Agency)*, 2014 CarswellNat 1415 (F.C.A.).
- *Seeley v. Canadian National Railway*, 2014 CarswellNat 1421 (F.C.A.).

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